Much Ado About Dittos: *Wewaykum* and the Fiduciary Obligation of the Crown

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The Crown's special fiduciary obligation to Canadian aboriginal peoples has offered a pliant tool for aboriginal redress against the state. The duty has two related but distinct forms, a common law form based on the Supreme Court of Canada's 1984 decision in Guerin v. R. *and a constitutional form based on the Court's 1990 decision in* R. v. Sparrow. *The constitutional form is grounded in section 35(1) of the* Constitution Act, 1982, *and was incorporated into the Court's guidelines on section 35(1) justification, but the* Guerin *form remained more obscure. The Court has applied the* Guerin *duty flexibly, but has paid less attention to clarifying its scope, content and consequences. It has been unclear just what interests that duty protects, and what level and form of protection it requires. The duty is an exception to the general proposition that the Crown should be free from fiduciary duties because of its broader public obligations. In* Guerin, *the Court justified the exception on the basis of the "unique" independent character of aboriginal title. However, for aboriginal interests derived from aboriginal title, the Court failed to say how much independence was needed. Moreover, after* Guerin, *the Court tended to neglect that issue and other outer parameters of the duty. One result was a flood of* Guerin*-type fiduciary cases in the lower courts.*

In Wewaykum Indian Band v. Canada, *aboriginal resettlement and competition for land, and a bizarre bureaucratic blunder, brought one of those cases to the Supreme Court, giving the Court an opportunity to address the uncertainties. In its decision in 2002, the Court held that "there are limits" to the special Crown-aboriginal duty, and that the competing claims of the Wewaykum and Wewaikai Bands fell outside those limits. In so holding, the Court said more than ever before about the special duty in its* Guerin*-type context. The Court referred to important aspects of the duty, such as an independent interest, an undertaking, discretionary control and vulnerability, and it drew a link between the content of the duty and the nature of the protected interest. For all these reasons,* Wewaykum *is a significant decision. Still lacking, though, is an attempt to gather up the propositions in that case and in earlier cases on the* Guerin *duty, and to articulate a general analytical approach to the duty. What is at stake is not just conceptual tidiness, but the need to help the courts maintain a reasonable balance*

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between fairness and the general duties of the state. This article offers some suggestions toward both of those goals.

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I. Cloud In the Crystal Ball

With a "careless slip" of the hand, a government clerk forgot to remove a pair of ditto marks after recording an Indian land transfer.[1] He might have been surprised to learn that nearly a century later, his artless action contributed to a major Supreme Court of Canada decision on the fiduciary obligation of the Crown to aboriginal peoples.

But law can be as unpredictable as facts. When the Supreme Court laid the foundations of the Crown's fiduciary obligation in the *Guerin* case in 1984 and in the *Sparrow* case in 1990, nobody knew how this pliant new obligation would evolve.[2] Over a decade later, the law was still being described as "unsettled."[3] In its 2002 decision in *Wewaykum Indian Band v. Canada*,[4] the Supreme Court tried to provide some clarification. The result: there is still cloud in the crystal ball.[5] This paper examines

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1. The error occurred in 1907. See Part II, below.

2. *Guerin v. R.*, [1984] 2 S.C.R. 335 [*Guerin*] and *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].

3. See *e.g. B.C. Native Women's Society v. Canada*, [2000] 1 F.C. 304 at para. 20 (T.D.) [*B.C. Native Women's Society*]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2001] F.C.J. No. 1877 at para. 127 (T.D.) (QL) (referring to justification under section 35(1) of the *Constitution Act, 1982*); *Key Designs Ltd. v. Zovko*, [2002] O.J. No. 2783 at para. 96 (Sup. Ct. Jus.) (Q.L.). In 2003, the Ontario Court of Appeal was still using the term to describe this area of law: *Lafrance Estate v. Canada (A.G.)*, [2003] O.J. No. 1046 at para. 32 (Q.L.); and *Bonaparte v. Canada (A.G.)* (2003), 64 O.R. (3d) 1 at para. 32 (C.A.) [*Bonaparte*].

4. 2002 SCC 79 [*Wewaykum*], aff'g *Roberts v. Canada*, [2000] 3 C.N.L.R. 303, 247 N.R. 350, 27 R.P.R. (3d) 157, [*Roberts FCA*], aff'g (1995), 99 F.T.R. 1 [*Roberts TD*]. *Wewaykum* was preceded by *Roberts v. Canada*, [1989] 1 S.C.R. 322 [*Roberts 1989*], aff'g [1987] 2 F.C. 535 (C.A.), aff'g [1987] 1 F.C. 155 (T.D.), on a question of jurisdiction.

5. Five months after Binnie J. gave the judgment for the Supreme Court in *Wewaykum*, matters threatened to become still more unclear. It was discovered that, 15 years earlier, Binnie J. had been involved briefly in discussions about the Bands' claims in his capacity as Deputy Minister of Justice. Binnie J. stated that he could not recall the involvement. However, the Bands argued that the situation raised a reasonable apprehension of bias on the part of both Binnie J. and the Court. The Bands moved to vacate the judgment, and Binnie J. absented himself from all further involvement in the proceedings. On September 26, 2003, in *Wewaykum Indian Band v. Canada*, 2003 SCC 45, the eight Supreme Court judges other than Binnie J. rejected the bias allegations and dismissed the motion to vacate.

the complex factual and legal challenge that confronted the Court in *Wewaykum*, considers the Court's answers, and proposes some possible reforms.

II. Offending Dittos

The facts behind this important case are unusual. Each of two Bands in the Laich-kwil-tach First Nation claimed reserves on northeastern Vancouver Island that were occupied by the other. As well, each Band sued the Crown for breach of the Crown's fiduciary duty in regard to the allocation of the land for the reserves.

The dispute dated back to the late 19th century. By then, the Laich-kwil-tach First Nation had displaced the Comox First Nation in this area, only to face competition for the land from non-Indian settlers.[6] The government intervened and allocated several parcels of land as "reserves" for the Indians. In its Reserves Schedules, the Department of Indian Affairs listed the name of the Wewaikai (Cape Mudge) Band opposite several reserves, including Reserves 11 and 12.[7] But meanwhile, the Wewaykum (Campbell River) Band had been settling on Reserve 11, where it got into a fishing dispute with the Wewaikai.[8]

The dispute seemed to be resolved in 1907. With the Wewaykum in attendance, the Wewaikai issued a resolution giving up any interest in Reserve 11, except fishing rights. Shortly after, the Indian Affairs clerk added the name of the Wewaykum (Campbell River) Band to the Schedules, in handwriting, opposite Reserve 11. The Wewaikai's quiet claim and internal departmental correspondence suggested that only

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6. See *Roberts 1989*, *supra* note 4 at paras. 19-147 (early period) and paras. 213-77 (reserve creation) for detailed historical descriptions.

7. In the Department of Indian Affairs 1902 Schedule of Indian Reserves, entries were made as follows, with the use of ditto marks:

Reserve 8	We-way-akay
Reserve 9	" "
Reserve 10	" "
Reserve 11	" "
Reserve 12	" ".

8. To complicate matters, at the time of this dispute, a logging company informed the Indian Agent that it would like to cut timber on Reserve 11.

Reserve 11 was intended for the Wewaykum. However, the clerk forgot to remove the dittos opposite Reserve 12. As a result, it appeared that the Wewaykum had been allocated *both* parcels.[9]

The error had little effect at first. When the Wewaikai and Wewaykum appeared before the McKenna McBride Commission[10] in 1914, the first Band made no claim to Reserve 11 and the second Band made no claim to Reserve 12. The Commission's report noted the ditto error but failed to correct it. In 1928 a departmental official asked for a correction, but got no response. By this time, the error was causing some concern to the Bands. Both Bands hired lawyers in the early 1930s and asked Indian Affairs for an explanation. The Indian Agent gave them a full description of the circumstances of the 1907 transactions and of the intent to allocate only Reserve 11 to the Wewaykum.

Again, this seemed to resolve matters. In 1936, the Wewaikai issued a declaration claiming Reserve 12 but not Reserve 11. The following year, the Wewaykum issued a declaration claiming Reserve 11 but not Reserve 12. Despite this, the province included the ditto marks in a schedule to a 1938 order in council that transferred the Crown's interest in the land to the federal government. Following the transfer, Reserves

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9. The annotated 1902 Schedule looked like this:

Reserve 8	We-way-akay band
Reserve 9	" "
Reserve 10	" "
Reserve 11	Wewaykum band [added in handwriting]
Reserve 12	" "

Who was the clerk and how did the error occur? The error might have been made by the Superintendent of Indian Affairs, Mr. A.W. Vowell, or by someone working under him. On learning of the 1907 resolution by which the Wewaikai ceded their interest (apart from fishing rights) in Reserve 11 to the Wewaykum, Superintendent Vowell wrote to the local Indian Agent to ask if Reserve 12 had also been included in the cession. The Agent wrote back to confirm that the resolution did not affect Reserve 12. Effectively, this left Reserve 12 with the Wewaikai. However, someone in Mr. Vowell's office forgot to replace the ditto marks (which were now directly under the name "Wewaykum"), with the name Wewaikai. The new 1913 Schedule of Reserves reproduced this part of the annotated 1902 Schedule in typescript, complete with the ditto marks under the new Wewaykum entry.

10. See *Wewaykum*, *supra* note 4 at paras. 46-49 for the role of the Commission.

11 and 12 became official reserves under the federal *Indian Act.*[11] In 1943, the ditto mark error was corrected in the Indian Affairs Schedule of Reserves.

Controversy over the reserves broke out again in the 1970s. The Wewaykum were still living on Reserve 11. Although most Wewaikai lived on a reserve on nearby Quadra Island, some lived on Reserve 12. A year after the Supreme Court's decision in *Guerin,*[12] the Wewaykum sought a declaration that they were entitled to Reserve 12. They also sued the Crown for breaching its fiduciary duty in failing to protect that entitlement. They sought about $4 million in damages from the Crown. In response, the Wewaikai sued the Wewaykum for entitlement to Reserve 11. They too sued the Crown, for breaching its fiduciary duty in failing to protect *their* claimed entitlement. They sought about $13 million in damages from the Crown.

From the situation as a whole, one fact stood out: each Band was claiming land on which the other was well established, decades after each had supposedly acknowledged the other's right to the land. Hence, unless either Band could show a fiduciary breach by the Crown, each faced an uphill battle.

III. Litigation

In the end, all three levels of court rejected the Bands' claims against each other and their fiduciary claims against the Crown. Teitelbaum J. of the Federal Court Trial Division held that the claims were all barred by the 30-year statutory limitation period[13] and by the doctrine of laches and acquiescence.[14] He also held that there had been no breach of the Crown's fiduciary duty,[15] as there had been no deliberate misrepresentation and no failure to advise prudently. Teitelbaum J.

11. R.S.C. 1985, c. I-5.
12. *Supra* note 2.
13. *Roberts TD, supra* note 4 at para. 148.
14. *Ibid.* at para. 207.
15. *Ibid.* at para. 595.

dismissed the actions without costs, except for the Wewaikai's action against the Crown, which he dismissed with costs.[16]

A majority of the Federal Court of Appeal found no breach of the Crown fiduciary duty,[17] and no basis for the other equitable actions. They found it unnecessary to deal with the limitations, laches and acquiescence defences. A different majority said that these would bar a claim for breach of fiduciary duty or any other equitable claim.[18] The Court of Appeal dismissed the claims, but without the costs ordered by the trial judge.

The Supreme Court of Canada came to similar conclusions. It dismissed all the claims, leaving each Band entitled to the reserve it was using. However, the Supreme Court engaged in a wide-ranging discussion of the Crown's fiduciary duty. As will be seen, there were compelling reasons for doing so.

IV. Fiduciary Law Problems

A. The Challenges

Like most aboriginal law, Canadian case law on the Crown's fiduciary obligation to aboriginal peoples is an effort at bridging a gap. On one side is the need for effective redress against the state from the general legal system; on the other is the historic and continuing fact of aboriginal uniqueness.[19]

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16. See *ibid.* at para. 656 where Teitelbaum J. said "the trial was unduly extended because of the very weak nature of Cape Mudge's claim" and their "unduly lengthy" submissions.

17. *Roberts FCA*, *supra* note 4 at para. 126. According to McDonald J., Linden J. concurring, "[t]here is no indication of favouritism, concealment of material facts, or improvidence."

18. *Ibid.* at para. 45, Isaac J., Linden J. concurring.

19. For some Canadian commentaries on the obligation, see Michael J. Bryant, "Crown-aboriginal Relationships in Canada: the Phantom of Fiduciary Law" (1993) 27 U.B.C. L. Rev. 19; Mark Ellis, *Fiduciary Duties in Canada* (Toronto: Carswell, 1993) c. 14, part 4; David W. Elliott, "Aboriginal Peoples in Canada and the United States and the Scope of the Special Fiduciary Relationship" (1996) 24 Man. L.J. 137 [Elliott, "Special Fiduciary Relationship"]; David W. Elliott, *Law and Aboriginal Peoples in Canada*, 4th ed. (North

To obtain assistance from Canadian courts, a party must present a claim in a form that is recognized in law. One of the most flexible of these forms is fiduciary law. Generally speaking, a fiduciary relationship is the equitable relationship that results when one party undertakes to act for the benefit of a second party who depends on the discretionary power of the first to carry out the undertaking.[20] There is an undertaking, a discretionary power, a corresponding vulnerability in the beneficiary and a cognizable interest. A common form of fiduciary duty is a trust, which imposes a duty to protect the property of another.[21] Courts hold trustees and other fiduciaries to a high standard of conduct, normally requiring a duty of loyalty and utmost good faith in regard to the best interests of the beneficiary.[22] The duty can be enforced by equitable remedies, including damages.

However, where the claim is against government, courts apply special restrictions. In fiduciary contexts that involve property rights, courts apply a "political trust" presumption. They hold that the Crown is not normally subject to legally enforceable fiduciary obligations in regard to

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York, Ontario: Captus Press, 2000) at c. 8 [Elliott, *Aboriginal Peoples in Canada*]; Peter W. Hutchins, David Schultz & Carol Hilling, "When Do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59 Sask. L. Rev. 97; Alain Lafontaine, "Fiduciary Obligations in the Context of Native Law: The Historical Context" in *UFO's: Unidentified Fiduciary Obligations: Conference Proceedings* (Winnipeg: Canadian Bar Association, May 28, 1994); David P. Owen, "Fiduciary Obligations and Aboriginal Peoples: Devolution in Action" [1994] 3 C.N.L.R. 1; Canada, Royal Commission on Aboriginal Peoples, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, vol. 2 (Ottawa: Supply and Services, 1995) at 1; Leonard I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Title Relationship in Canada* (Toronto: University of Toronto Press, 1996); Alan Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?" (1993) 2 N.J.C.C. 163; Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261; and Lorne Sossin, "Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law" (2003) 66 Sask. L. Rev. 129 [Sossin, "Public Fiduciary Obligations"].

20. Elliott, *Aboriginal Peoples in Canada, ibid.* at 78; Elliott, "Special Fiduciary Relationship," *ibid.* at 14 and see authorities referred to therein.

21. *Ibid.*

22. Elliott, *Aboriginal Peoples in Canada, ibid.* at 76 and see authorities referred to therein.

property rights that have been created by the legislative or executive branches of government.[23] There are two main overlapping rationales for this presumption. First, the Crown has unique responsibilities to the public as a whole, including the task of managing the public's property for the common good. Placing the Crown under fiduciary duties to specific groups or individuals could hinder its ability to fulfill this management responsibility.[24] Second, the Crown is politically accountable for the way it fulfils its public responsibilities, and court-imposed duties could undermine this accountability.[25]

The political trust cases are aspects of the more general principle that "the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function."[26] Hence, whether or not property is involved, courts tend not to impose legally enforceable fiduciary duties on the Crown in regard to its public responsibilities.[27] To justify imposing these duties, special circumstances are required.[28]

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23. See *e.g. Kinloch v. Secretary of State for India in Council* (1882), 7 App. Cas. 619; *Hereford Railway Co. v. R.* (1894), 24 S.C.R. 1; *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129 (Ch.) [*Tito*]; *Gardner v. R.* (1984), 7 D.L.R. (4th) 464 (O.H.C.); *Guerin, supra* note 2 at 371-72, 378-79, 350-52; *Penikett v. R.* (1987), 45 D.L.R. (4th) 108 at 122 (Y.C.A.); *Callie v. R.*, [1991] 2 F.C. 379 at 388-95 (T.D.) [*Callie*]; Peter W. Hogg & Patrick J. Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at 257-60; and *Authorson v. Canada (A.G.)* (2002), 58 O.R. (3d) 417 at paras. 41-81 (C.A.) [*Authorson*]. In *Authorson* at para. 60, the Ontario Court of Appeal required not that the property be created by the legislature or executive, but that it be "held" by the Crown. This helped the Court to find that where property passes into private hands, it is no longer held by the Crown.

24. This is arguably the basis of the general statement in a leading case, *Tito, ibid.* at 211 and 217, where it was held that it would be incongruous to hold the Crown to legal obligations to one group in regard to property from the public as a whole.

25. *Authorson, supra* note 23 at para. 62.

26. *Guerin, supra* note 2 at 385. See also *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J., dissenting on another issue.

27. As well as *Guerin, ibid.*, see *Edwards v. Canada (A.G.)*, (2000) 35 C.R. 270 at para. 39 (Ont. Sup. Ct. Jus.) [*Edwards*]; *Romagnuolo v. York Regional Police*, [2001] O.J. No. 3537 at para. 38 (Q.L.) [*Romagnuolo*]; *White v. Ontario*, [2002] O.J. No. 2171 at para. 85 (Sup. Ct. Jus.) (Q.L.) [*White*].

28. For examples of evidence of a definite legislative or executive intent to create or assume a specific fiduciary duty, see *K.L.B. v. British Columbia*, [1996] B.C.J. No. 3036 (S.C.) (Q.L.) [*K.L.B.*]. Other special circumstances might include evidence of exceptional discretion and vulnerability, and an absence of other means of redress.

On the other side of the gap is the fact that aboriginal peoples occupied northern North America before anyone else, in distinctive societies, with their own laws and customs.[29] Since the assertion of British sovereignty, the Crown has had an historic relationship with aboriginal peoples.[30] As a central part of this relationship, the Crown has assumed a responsibility for preserving, defending, and replacing original Indian lands. But the power to protect includes the power to harm. Accordingly, links are needed between the ordinary law and this special relationship.

When *Wewaykum* first reached the Supreme Court in 2001,[31] Canadian case law had already started to bridge the gap by establishing an enforceable Crown fiduciary duty to aboriginal peoples. However, the Court in *Wewaykum* still faced four distinct but related problems with completing the bridge. First, its own jurisprudence on the duty was recent, fluid and undeveloped. Clarity had taken a back seat to flexibility. Second, there was a growing flood of Crown-aboriginal fiduciary litigation in the lower courts. Third, some lower courts disagreed on the proper interpretation of *Guerin*. Fourth, *Wewaykum* itself raised important fiduciary issues that had not been authoritatively decided. To understand the Supreme Court's approach in *Wewaykum*, it is important to look at each of these problem areas in turn.

B. Earlier Supreme Court Jurisprudence

The first major Canadian decision on the special Crown-aboriginal fiduciary duty was *Guerin*, in 1984, where the B.C. Musqueam Band argued that the Crown owed them a trust-like duty under the law of trusts when it used its discretion to surrender their *Indian Act* land on their behalf.[32] In defence, the federal government relied on the political

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29. As stressed in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 42-43 [*Van der Peet*]. See also David W. Elliott, "Fifty Dollars of Fish: A Comment on *Van der Peet*" (1997) 35 Alta. L. Rev. 759 at 764-68.

30. As recognized by the Supreme Court of Canada in *Sparrow, supra* note 2 at 1103.

31. The case was argued on December 6, 2001; the Supreme Court released its judgment exactly one year later.

32. *Guerin, supra* note 2. *Indian Act*, R.S.C. 1985, c.I-5

trust principle that courts will not impose fiduciary duties on the Crown in relation to its own funds or other property.[33]

The Supreme Court of Canada found an ingenious way around the political trust obstacle. It said that aboriginal property interests, including *Indian Act* property interests, have a distinguishing feature. They are based on an interest that is *independent* of the Crown-aboriginal title.[34] Thus, these interests do *not* involve the Crown in a trust in regard to its own public property. Because these interests are independent of the Crown, they involve obligations in the nature of a private law duty,[35] not just a political trust. Moreover, in historic documents such as the *Royal Proclamation of 1763*, and more recently in the *Indian Act* surrender provisions, the Crown had made a discretionary undertaking to aboriginal peoples. Hence, when the Crown surrendered Musqueam lands for a golf course lease without proper consultation, and for far less rent than promised, it had breached its fiduciary duty and was liable for $10 million in damages.

Because the source of the independence of the interest was aboriginal title, it was important to know what kind of connection was needed between this title and the interest of the claimants. The Court said merely that, in this case, the two interests are "the same"[36] for the purposes of the duty. This suggests that perhaps only a loose connection was needed. Since there was no major controversy about the fact of Crown mismanagement, about the presence of conflicting Crown duties, or about the form of relief that was sought, the Court said little about these issues. The focus was on application, not definition.

Six years later, the fiduciary concept resurfaced in a dramatically different setting. Another member of the Musqueam Band, Ronald

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33. *Supra* note 20.

34. *Guerin, supra* note 2 at 351-52, 378-79.

35. *Ibid.* at 385. Aboriginal title, the most extensive form of aboriginal right, has been described as "the right to exclusive use and occupation of . . . land": *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*]. A relationship to land is also important to the broader category of aboriginal rights: see *R. v. Powley*, 2003 SCC 43 at paras. 36-37, in regard to Inuit and Indians' aboriginal rights, and to Métis aboriginal rights, respectively.

36. *Guerin, supra* note 2 at 379. Dickson J. added that in any event the property involved in this case was within the traditional lands of the Musqueam.

Sparrow, defended himself against a conviction for illegal fishing by relying on section 35(1) of the *Constitution Act, 1982*.[37] Mr. Sparrow argued that this provision guaranteed existing aboriginal and treaty rights against government regulation. Subject to one proviso, the Supreme Court of Canada agreed that section 35(1) guarantees these rights against *unjustified* government infringements.[38]

Since section 35(1) contains no words expressly guaranteeing aboriginal or treaty rights, and no provisions about justification, this interpretation needed some help. Among other things,[39] the Court said that section 35(1) was a kind of Crown promise to aboriginal peoples.[40] It was an undertaking about the use of government power—a promise not to infringe section 35(1) rights without meeting justification criteria prescribed by the courts. Thus *Sparrow* used the fiduciary concept to help support an interpretation that entrenched section 35(1) rights—subject to justified infringements—and to underpin the justification requirement in particular.

Although both *Sparrow* and *Guerin* were applications of the general Crown-fiduciary relationship, they were quite distinct from each other. On the one hand, *Sparrow* protected constitutionally guaranteed aboriginal or treaty rights, while *Guerin* protected interests in aboriginal land that were independent of the Crown.[41] *Sparrow* affected all government regulation, including legislation; *Guerin* bound only the executive and administrative actions of the Crown.[42] *Guerin* overcame the political trust presumption because it protected interests that were independent of the Crown; *Sparrow* was not concerned with this

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37. *Sparrow*, *supra* note 2.

38. *Ibid.* at 1109.

39. *Ibid.* at 1106-09 where the Court also relied on the general presumption that documents affecting aboriginal peoples should be construed liberally, in their favour, wherever possible.

40. *Ibid.* at 1108.

41. See *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2000] B.C.J. No. 1536 at para. 90 (S.C.) (Q.L.) [*Okanagan Indian Band*].

42. Otherwise valid legislation is not subject to legally enforceable fiduciary duties: see *Authorson*, *supra* note 23 at para. 15. In contrast, the fiduciary obligations in *Sparrow*, *supra* note 2 are based on constitutional guarantees that can override legislation. See also *Perron v. Canada (A.G.)*, [2003] O.J. No. 642 at para. 68 (Sup. Ct. Jus.) (Lexis) [*Perron*].

presumption because its protected interests were constitutionally guaranteed. The consequences of these decisions were distinct as well. The remedy in *Sparrow*—the constitutional invalidity of the offending government regulation[43]—was negative. *Guerin*, in contrast, provided equitable remedies, such as compensation, that could be positively enforced against the executive.

From the outset, the scope, content and consequences of the *Sparrow* obligation were more fully described than the duty in *Guerin*. *Sparrow*'s protected interests are referred to in section 35(1) itself. The *Sparrow* Court specified many of the ingredients of justification, including proof of a valid legislative objective, such as conservation, and evidence of accommodation by such means as resource use priority, consultation, and compensation where appropriate. The consequence of an unjustified infringement—constitutional invalidity—was a direct result of section 52 of the *Constitution Act, 1982*, that gives constitutional rights priority over other laws.

Throughout the 1990s, the Supreme Court spent time trying to refine the main elements of justification.[44] Following *Delgamuukw*,[45] the focus in section 35(1) cases was on accommodation. *Delgamuukw* suggested that courts should take a factor-based approach to accommodation.

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43. See *Perry v. Ontario* (1997), 33 O.R. (3d) 705 at 726-27 (C.A.) (leave to appeal to S.C.C. refused without reasons, [1997] S.C.C.A. No. 429); *Okanagan Indian Band*, *supra* note 41 at para. 92.

44. See especially *R. v. Adams*, [1996] 3 S.C.R. 101 [*Adams*]; *R. v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*]; *R. v. Badger*, [1996] 1 S.C.R. 771 [*Badger*]; and *Delgamuukw, supra* note 35. In *Adams* at para. 54, the Court held that an unstructured discretionary power may constitute an infringement of section 35(1) rights if it fails to provide the Crown with adequate direction for carrying out its fiduciary obligation to accommodate those rights. In *Gladstone*, the Court worked on reconciling the demands of the special fiduciary obligation with the public and third party interests. The Court also added economic and regional fairness, and historical resource reliance by non-aboriginal groups to *Sparrow*'s list of potentially valid legislative objectives in *Adams* at para. 52. *Badger* at para. 41 applied the *Sparrow* test to treaty rights. In respect to the latter case, the Court saw the fiduciary concept as requiring fairness, reasonableness, and the keeping of promises.

45. *Delgamuukw, ibid.* adapted the *Sparrow* approach, including the justification test, to the specific case of aboriginal title. See also David W. Elliott, "*Delgamuukw*: Back to Court?" (1998) 26 Man. L.J. 97.

They should vary the nature and level of accommodation needed, according to considerations such as the importance of the relevant government objectives, the nature and extent of the infringement of the section 35(1) right, and the nature and importance of the right.[46] Justification analysis was still highly discretionary, but there were some signs of a conceptual framework.[47]

The *Guerin* duty got off to a slower start, and the leading 1990s post-*Guerin* decisions did little to move it ahead. In *National Energy Board*,[48] the Court addressed non-section 35(1) arguments separately from those based on *Sparrow*.[49] As to the former, it said that the quasi-judicial responsibilities of the National Energy Board were inconsistent with a relationship of utmost good faith between the Board and one of the parties before it.[50] Hence, there could be no fiduciary duty.[51] The Court added that any fiduciary duty would have been met, since the Crees had been given "the fullest opportunity to be heard."[52] The decision suggested a relatively fixed fiduciary content that might be compatible with some government functions and incompatible with others. Assuming that boundaries could be drawn between different

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46. See *Delgamuukw, ibid.* at paras. 162-69.

47. Generally speaking, the justification requirements seem to be aimed at reasonableness, fairness, and good faith. For a possible synthesis of the main justification elements, see *infra* note 143.

48. *Quebec (A.G.) v. Canada (National Energy Board)* (1994), 112 D.L.R. (4th) 129 [*National Energy Board*]. The James Bay Cree claimed that by failing to disclose all information at a regulatory hearing, the National Energy Board had breached a specific fiduciary duty to provide full procedural fairness and act in their best interests. They appeared to rely on both a *Guerin*-type duty and a *Sparrow*-type duty.

49. The discussion in the text addresses the Court's response to the *Guerin*-type duty. In regard to the *Sparrow*-type duty, the Crees argued that by these actions, the government had unjustifiably infringed their aboriginal rights, contrary to the requirements in *Sparrow*. The Court rejected this branch of the Crees' argument on the ground that there was a lack of evidence of a *prima facie* interference with aboriginal rights.

50. *National Energy Board, supra* note 48 at 147-48, where the Court stated: "[t]he nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed."

51. *Ibid.* at 148.

52. *Ibid.* at 148-49. Presumably the Court saw this consultation standard as requiring more than natural justice, which generally involves a *full* opportunity to be heard.

government functions, this all-or-nothing approach seemed at odds with the flexible equitable origins of the fiduciary concept.[53]

The Court took a more flexible approach to the *Guerin* duty in *Blueberry River*.[54] In a complex reserve surrender deal, the Department of Indian Affairs had transferred both mineral and surface interests to another government department for the purpose of settlement with war veterans.[55] Later, the mineral interests were found to be worth millions of dollars.[56] The Band claimed that the Crown had breached several fiduciary duties in regard to the transaction. The Supreme Court agreed that there had been fiduciary breaches for selling the mineral rights and for failing to revoke this sale.

The Court in *Blueberry River* varied the content of the fiduciary duty. Where the question was whether to sell or lease the Band's land and mineral rights, the Court imposed an absolute requirement to act in the Band's best interests. No allowance was made for the interests of the war veterans. In contrast, where the question concerned the adequacy of the price of the land, the veterans' competing interests in settlement became sufficiently compelling and immediate to be taken into account as well. Once these additional interests were involved, a standard of reasonableness replaced the usual standard of the exclusive best interests of the fiduciaries.[57]

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53. In a more recent decision involving a non-aboriginal claim against the Crown, the Supreme Court seemed to reject a category approach to immunity from fiduciary claims against the Crown. See *Paquette v. Desrochers*, [2002] S.C.C.A. No. 81, aff'g (2001), 151 O.A.C. 341 (C.A.) [*Paquette*], which dismissed a lower court ruling that the prosecutorial functions of the Attorney General are all immune from fiduciary liability.

54. *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, rev'g (1993), 100 D.L.R. (4th) 504 (F.C.A.) [*Blueberry River*] which had dismissed an appeal and cross-appeal from [1988] 1 C.N.L.R. 73 (F.C.T.D.). Gonthier J. gave the reasons for four of the seven judges; McLachlin J. wrote for the others. *Blueberry River* was a *Guerin* duty situation, with no claim of a regulatory infringement of guaranteed aboriginal or treaty rights.

55. The mineral rights transfer was not expressly authorized by the Band, and violated a departmental policy only to lease such rights.

56. Despite this, the Department failed to revoke the mineral rights transfer.

57. In *Blueberry River*, *supra* note 54 at paras. 1, 54, and 55, McLachlin J. said that it was sufficient that the Crown show that the price obtained for the land fell within the range of the appraisals received. Once this was shown, the onus shifted to the Band to show

Blueberry River suggested that where there are specific competing public interests, the level of the fiduciary duty can be affected by the immediacy and significance of the competing interests, and by the extent of the conflict. However, the decision did not say how other factors, such as the relative importance of the protected interest, might affect this situation.

In *Osoyoos*,[58] the Supreme Court extended the *Guerin* duty, and began to formulate an approach for addressing conflicting public and fiduciary duties. The question was whether land that had been expropriated for a canal was still part of a reserve and was therefore subject to Indian Band taxation. The Court said that the Crown's fiduciary duty applies to expropriation as well as to surrender situations.[59] For an expropriation, the Indian interest is subject to public as well as special fiduciary duties. In such a case, government should decide first if the public duty requires a particular course of action. If it does, government should then try to pursue that course of action with minimal disruption of the Indian interest.

The Court said that the fiduciary duty requires the expropriation document to show a clear and plain intention to remove land from a reserve.[60] Here the document was unclear as to the extent of the interest taken. In order to minimize disruption of the Indian interest, the expropriation document was construed to create an easement rather than a full fee simple.[61] As a result, the canal was still part of reserve land and was subject to Indian taxation. Although this was a different approach to public and private duties from that in *Blueberry River*, both contrasted sharply with the approach taken by the Court in *Grand Council of the Crees*.

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that the price was unreasonable. Gonthier J. concurred generally with McLachlin J.'s approach to the surrender of the surface rights.

58. *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, rev'g (1999), 172 D.L.R. (4th) 589 (B.C.C.A.), which aff'd (1997), 145 D.L.R. (4th) 552 (B.C.S.C.) [*Osoyoos*].

59. *Ibid.* at para. 52.

60. *Ibid.* at para. 47.

61. *Ibid.* at para. 90.

In other cases, although the Crown-aboriginal fiduciary duty was not directly at stake, the Supreme Court commented on it in passing.[62] For example, in *Ross River Dena Council Band v. Canada*,[63] the Court said that the Crown-aboriginal fiduciary duty attached to land and that the duty could apply to the creation of reserves.[64]

Despite these attempts at clarification, the *Guerin* duty was still largely unsettled territory. Major questions remained about the scope of the Crown-aboriginal duty, its content, consequences and relationship to the constitutional obligation in *Sparrow*. In particular, it was still unclear as to when the duty could arise in non-section 35(1) contexts, what non-surrender interests might qualify for protection and what level and kind of duties would be required in different circumstances.

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62. For example, in *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 at 676, the Court quoted from the *Guerin* statement that the aboriginal reserve interest overcame the political trust presumption because it was rooted in aboriginal title. In the treaty case of *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570 at 575, the Court noted that the Crown had conceded "that it had failed to comply with some of its obligations under this agreement [the Robinson-Huron Treaty], and thereby breached its fiduciary obligations to the Indians." *Roberts 1989*, *supra* note 4 at 337 determined that the Federal Court of Canada had jurisdiction to hear the dispute between the Wewayakai (Wewaikai) and the Wewayakum regarding their reserves. The Court said that one source of the answer to the dispute was "the common law relating to aboriginal title which underlies the fiduciary nature of the Crown's obligations." See also *Dena Council Band v. Canada*, 2002 SCC 54, see *infra* note 63 [*Ross River*].

63. *Ross River*, *ibid.*, aff'g (2000), 182 D.L.R. (4th) 116 (Y.T.C.A.), rev'g [1998] 3 C.N.L.R. 284 (Y.T.S.C.), [1998] Y.J. No. 63 (Y.T.S.C.) (QL), declaring a parcel of land to constitute a reserve under the *Indian Act*.

64. The Court stated in *Ross River*, *ibid.* at paras. 62, 68 and 77:

> [a]lthough this is not at stake in the present appeal, it should not be forgotten that the exercise of this particular power [reserve creation] remains subject to the fiduciary obligations of the Crown as well as to the constitutional rights and obligations which arise under s. 35 of the *Constitution Act, 1982*...

Regarding the content of the duty, the Court said the Crown should take into account the fact that the lands in question had been occupied by the Band for almost half a century.

C. Lower Court Claims

A lack of full direction from the highest court may have contributed to a profusion of Crown-aboriginal fiduciary claims in lower courts across the country.[65] In *Wewaykum* itself, the Supreme Court referred to eight of these claims, which covered a wide assortment of responsibilities.[66] These claims related mainly to the scope of non-

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65. Many of these are based on alleged unjustified infringement of section 35 rights. Many others relate more to non-section 35(1) contexts, and tend to invoke the *Guerin* decision, *supra* note 3. Examples of the latter include: *Kruger v. R.*, [1986] 1 F.C. 3 (C.A.); *Lower Kootenay Indian Band v. Canada*, [1991] 2 C.N.L.R. 54 (F.C.T.D.); *Montana Band v. Canada*, [1991] 2 F.C. 273 (T.D.); *Hopton v. Pamajewon* (1993), 16 O.R. (3d) 390 (C.A.); *Holiday Park Developments Ltd. v. Canada*, [1994] F.C.J. No. 193 (T.D.) (Q.L.); *Nathanson, Schachter & Thompson v. Sarcee Indian Band*, [1994] B.C.J. No. 690 (C.A.) (Q.L.); *Enoch Band of Stony Plain Indians v. R.*, [1994] 3 C.N.L.R. 41 (F.C.A.); *Semiahmoo Indian Band v. Canada (District Manager)* (1997), 148 D.L.R. (4th) 523 (F.C.A.); *Mannpar Enterprises v. Canada*, [1999] B.C.J. No. 850 (C.A.) (Q.L.); *Berscheid v. Ensign*, [1999] B.C.J. No. 1172 (S.C.) (Q.L.); *F.S.M. v. Clarke*, [1999] B.C.J. No. 1973 (S.C.) (Q.L.); *Bear Island Foundation v. Ontario*, [1999] O.J. No. 4290 (C.A.); *Chippewas of Sarnia Band v. Canada (A.G.)* (2000), 51 O.R. (3d) 641 (C.A.); *Couchiching First Nation v. Canada (AG)*, [1999] O.J. No. 5080 (Sup. Ct. Jus.) (Q.L.); *Chingee v. British Columbia*, [2002] B.C.J. No. 2544 (S.C.); *R. v. Douglas*, [2000] B.C.J. No. 2701 (Prov. Ct.) (Q.L.); *Bonaparte*, *supra* note 3 at para. 32. For further examples, see *infra* note 66.

66. *Wewaykum*, *supra* note 4 at para. 82. See *Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band*, [1997] 1 F.C. 689 (C.A.) (activities included structuring of elections); *Southeast Child & Family Services v. Canada (A.G.)*, [1997] 9 W.W.R. 236 (Man. Q.B.) (provision of social services); *B.C. Native Women's Society*, *supra* note 3 (rewriting of negotiated provisions); *Paul v. Kingsclear Indian Band* (1997), 137 F.T.R. 275 (provision for moving expenses); *Mentuck v. Canada*, [1986] 3 F.C. 249 (T.D.); *Deer v. Mohawk Council of Kahnawake*, [1991] 2 F.C. 18 (T.D.); *Chippewas of the Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)* (1996), 116 F.T.R. 37, aff'd (1999), 251 N.R. 220 (C.A.) (provision of access to information regarding Band affairs); *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*, [1989] 1 F.C. 143 (T.D.); *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997), 132 F.T.R. 106; *Ominayak v. Canada (Minister of Indian Affairs and Northern Development)*, [1987] 3 F.C. 174 (T.D.) (provision of legal aid funding); *Tuplin v. Canada (Indian and Northern Affairs)* (2001), 207 Nfld. & P.E.I.R. 292 (P.E.I.T.D.) (registration of individuals under the *Indian Act*); *G. (A.P.) v. A.(K.H.)* (1994), 120 D.L.R. (4th) 511 (Alta. Q.B.) (invalidation of a child adoption consent).

section 35(1) fiduciary duties.[67] They all required guidance with respect to the kind of aboriginal interests that are protected, beyond the reserve land interests in *Guerin*. The cases would come from another direction as well. Some lower court litigants were using *Guerin* as a basis for *non*-aboriginal fiduciary claims against the Crown.[68] Unless the highest court produced some clarification, many of these cases would be heading its way.

D. Disagreements Over Guerin

Guerin established that the special Indian title interest overcame the presumption against imposing trust-like fiduciary obligations on the Crown. Assuming, though, that there was no such evidence of an Indian title interest,[69] could the presumption against fiduciary duties be overcome by aboriginal or non-aboriginal claimants who were unable to rely on the special aboriginal interest?

Two lower court pension cases[70] revealed sharply opposing views on this issue. In *Callie*, veterans claimed a breach of a Crown fiduciary duty in regard to the federal government's management of their pension funds. The Federal Court judge said the veterans failed to overcome the political trust presumption. In his view, *Guerin* did not help them because the Crown fiduciary duty was based on the Indians' "unique and historical interest in reserve lands."[71]

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67. This was because *Wewaykaum, supra* note 4 did not involve an allegation of an infringement of section 35(1) rights. Section 35(1) justification cases were plentiful too.

68. See Part IV D., below.

69. *K.L.B., supra* note 28. Also no evidence of other special circumstances, such as a definite legislative or executive intent to create or assume a fiduciary duty.

70. For a different perspective on *Callie, supra* note 23 and *Authorson, supra* note 23 decisions, see Sossin, *supra* note 19. For another pension case that relates more to allocation of benefits than to management of existing benefits, see *Brogaard v. Canada (A.G.)*, [2002] B.C.J. No. 1775 (Q.L.) [*Brogaard*] (denial of past pension benefits to same-sex couples).

71. *Callie, supra* note 23 at para. 29.

In *Authorson*,[72] however, the Ontario Court of Appeal said that the political trust presumption applies only when the Crown still owns the interest in question. In this case, when the pension funds passed to the pensioners, the funds became a private interest that could be the object of a Crown fiduciary duty.[73] For the Court of Appeal, even an interest whose origin was public—an interest that lacked any kind of connection to pre-existing aboriginal title—might later acquire sufficient independence from the Crown to help overcome the political trust presumption.[74]

There were also questions about the significance of *Guerin* for the fiduciary liability of the Crown in general or non-proprietary contexts. Did it mean that aboriginal claimants could seek relief against the Crown under the general law, in addition to whatever claims they might have under the *sui generis* claim in *Guerin*?[75] And if the general law did not normally permit fiduciary actions against the Crown, just where

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72. *Authorson, supra* note 23, affirmed by *Authorson v. Canada (A.G.)*, 2003 SCC 39 without express reference to this reasoning, but with apparent acceptance of the existence of a Crown fiduciary duty.

73. *Ibid.* at para. 60:

> [i]mportantly, unlike this case, in neither [political trust] case could it be said that the funds held by the Crown were in any sense owned by those claiming that the Crown held the funds in trust for them. Here, the fact that each veteran had a property interest in the fund being administered on his behalf is a clear indication that this is not a political trust. By contrast, the 'political trust' cases involve not private funds, but public funds or property held by the Crown, whose distribution is found to be the province of the political arena, not the courts.

See also para. 73, reason (b).

74. *Ibid.* As noted by Sossin, *supra* note 19, the Court of Appeal seems to have also based its decision on a finding that the fiduciary obligation was imposed by legislation. See *Authorson*, *ibid*, at para. 73, reason (h). When the case reached the Supreme Court, the Crown conceded the existence of a fiduciary duty: *Authorson*, *ibid.* at paras. 2, 8. The Court suggested—without saying why—that the Crown did owe a fiduciary duty, but it decided the case on another issue. Although the Court might have taken the duty from the Crown's concession, or from the wording of the legislation, it did say that at para. 15: "[t]he *Department of Veterans Affairs Act*, s. 5.1(4) takes a property claim from a vulnerable group, in disregard of the Crown's fiduciary duty to disabled veterans. However, that taking is within the power of Parliament. The appeal has to be allowed."

75. As argued by the claimants in *Squamish Indian Band v. Canada*, [2000] F.C.J. No. 1568 at paras. 468-69 (Q.L.) [*Squamish*].

were they possible? For both aboriginal claimants[76] and non-aboriginal[77] claimants, the answers varied widely.[78]

E. Fiduciary Questions in Wewaykum

The situation in *Wewaykum* brought many of these issues of scope, content, and consequences[79] directly before the Supreme Court of Canada.

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76. See *e.g. Squamish*, *ibid.*; *Authorson*, *supra* note 23.

77. The following illustrate the range of non-proprietary, non-aboriginal fiduciary duty claims being made against the Crown: *Fredrikson v. Insurance Corporation of British Columbia*, [1990] B.C.J. No. 717 (S.C.) (Q.L.) (refusal to settle insurance claim on behalf of claimant, resulting in higher liability); *J.H. v. British Columbia*, [1998] B.C.J. No. 2926 (S.C.) (Q.L.); *A.(C.) v. C.(J.W.)*, [1998] B.C.J. No. 2587 (C.A.) (Q.L.) [*Critchley*] (negligence in role as legal guardian of children); *Hogan v. Newfoundland (A.G.)*, [2000] N.J. No. 54 (C.A.) (Q.L.) (implementation of constitutional amendment affecting supporters denominational school changes); *Paquette*, *supra* note 53 (exercise of prosecutorial functions by the Attorney General); *Romagnuolo*, *supra* note 27 (shooting incident during arrest by police); *Harris v. Canada*, [2000] S.C.C.A. No. 364 denying leave to appeal, without reasons, from (2000), 187 D.L.R. (4th) 419 (F.C.A.) (QL) (alleged favouritism in tax ruling by Minister of National Revenue, complained of by taxpayers' organization). See also *Edwards*, *supra* note 27; *Brogaard*, *supra* note 70; *White*, *supra* note 27; *Squires v. Canada (AG)*, [2002] N.B.J. No. 330 (Q.L.) (Q.B.T.D.).

78. See the cases above at note 3, describing the law here as "unsettled." In *Critchley*, *ibid.*, a case involving a fiduciary claim against the Crown, McEachern C.J. said that:

> Our Supreme Court of Canada has led the way in the common law world in extending fiduciary responsibilities and remedies but it has not provided as much guidance as it usually does in emerging areas of law . . . judges, lawyers and citizens alike are often unable to know whether a given situation is governed by the usual laws of contract, negligence or other torts, or by fiduciary obligations whose limits are difficult to discern.

79. These three main dimensions might be described as follows:

(i) Scope and distinguishing feature. The concern here is with the kind of Crown functions and beneficiary's interests to which the duty applies, and the kind of situations, if any, that can exclude the duty. The scope of the duty should be considered together with the question of distinctiveness. This looks at the aspect of the interest that distinguishes it from the normal constraints of the political trust principle.

(ii) Content. This dimension concerns what the duty requires and the factors that can affect its nature and level, when it does apply.

(iii) Consequences. The concern here is with the application and consequences of the duty, and with the factors that influence these elements.

(i) What Kind of Non-section 35(1) Interest Can Be Subject to the Crown Fiduciary Duty?

Because no section 35(1) rights were argued in this case, none of the principles specific to the *Sparrow* obligation were applicable. Since the parcels did not seem to lie within traditional Laich-kwil-tach First Nation lands, there was no specific link with a pre-existing independent aboriginal title. Moreover, the Court determined in *Wewaykum* that before 1938, neither the Wewaikai nor the Wewaykum had a formal legal interest in the parcels of land in question.[80] Thus, although both Bands had an interest in land, neither had an interest that was identical to that in *Guerin*. Did this mean that their claims were blocked by the political trust presumption against Crown fiduciary duties? There were echoes here of the *Callie/Authorson* controversy.[81]

(ii) Is the Content of the Duty Affected by the Nature of the Protected Interest?

The Wewaikai claimed breaches based on the federal government's failure to disclose that a lumber company was interested in the land, its failure to protect an administrative allocation of land and its failure to prevent the other Band from settling on the land. However, all of these breaches occurred before the Wewaikai had a formal beneficial reserve interest in the land. Could the Crown be held to this level of obligation in regard to this kind of interest? Did the standard rise when the land formally became a reserve?

(iii) Can the Outcome Be Affected by the Conduct of the Crown?

The federal government argued that its officials had compensated for the ditto mark error by explaining it thoroughly to the Bands and

80. *Wewaykum*, *supra* note 4 at para. 98.
81. See Part IV D., above.

disclosing all material facts to them. If this were so, how did it affect the allegations of breach of fiduciary duty?

(iv) Can the Duty Be Excluded by the Conduct of the Claimants?

The federal government argued that by recognizing each other's lands in the past, the Bands had acquiesced in their possession of the land and had barred themselves from claiming a breach of duty in regard to the land. It also argued that because the Band had not pursued its claims earlier, the claims were barred by the relevant limitations statutes.

V. The Supreme Court of Canada's Response

A. General Disposition

Like the lower courts in *Wewaykum*, the Supreme Court held that there was no basis for the Bands' claims against each other and that the Crown had not breached its fiduciary duty either before or after the parcels were formally established as *Indian Act* reserves in 1938. It held that in any event, any equitable claims would have been barred by the statutory limitations period and by the doctrine of laches and acquiescence.[82]

B. "There Are Limits"

Binnie J. delivered the judgment for a unanimous nine-member court. He stressed that both flexibility *and* clarity are important to the scope of the Crown-aboriginal fiduciary duty. He also noted the wide range of fiduciary allegations in this case[83] and observed that "[s]ince *Guerin*, Canadian courts have experienced a flood of 'fiduciary duty' claims by Indian Bands across a whole spectrum of possible complaints."[84] He

82. The Supreme Court did say that courts could not correct the ditto mark error contained in the provincial order in council; the redress here, if any, was in the realm of fiduciary law: see Part VII, below.

83. *Wewaykum*, *supra* note 4 at para. 81.

84. *Ibid.* at para. 82.

stated that the duty has a broad purpose: "[t]he fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples."[85]

Because of the breadth of this control, potential fiduciary relief is not limited to section 35(1) or existing reserve rights.[86] Binnie J. continued:

> But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.[87]

What *are* these limits? What did the Supreme Court say is needed for the Crown-aboriginal duty to exist?

C. An Independent Interest

Binnie J. began his discussion of the fiduciary duty by summarizing *Guerin*. According to the Court, *Guerin* established that even though the Crown has public responsibilities, it can owe a fiduciary duty to aboriginal peoples.[88] This can result from an interest that gives rise to an obligation "in the nature of a private law duty."[89] An example, he said, is the quasi-proprietary interest in reserve land. On the other hand, a government benefits program "will generally give rise to public law remedies only."[90]

This obligation "in the nature of a private law duty" displaces the usual political trust presumption against imposing fiduciary duties on the Crown. What gives rise to this obligation is the fact that aboriginal peoples have pre-existing independent legal rights in their lands. This

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85. *Ibid.* at para. 79.
86. *Ibid.*
87. *Ibid.* at para. 81.
88. *Ibid.* at para. 74.
89. *Ibid.*, quoting from *Guerin, supra* note 2 at 385. See also *ibid.* at para. 85, where the Court used this phrase again.
90. *Ibid.* at para. 74.

was stated "in a passage [from *Guerin*] that should be set out in its entirety":[91]

> Indian title is *an independent legal* right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. For this reason . . . [the] "political trust" decisions are inapplicable to the present case. The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by section 18(1) of the *Indian Act*, or by any other executive order or legislative provision.[92]

Evidently, one main requirement for a Crown-aboriginal fiduciary duty is the existence of an independent Indian interest. In *Guerin*, this was the reserve interest, which could be said to be rooted in the Indians' pre-existing legal right to the land.

D. An Undertaking, Discretionary Control, and Vulnerability

Binnie J. said that, although *Guerin* involved an existing reserve interest,[93] the Crown-aboriginal duty is not limited to existing reserves or to section 35(1) rights. Quoting from *Sparrow*,[94] Binnie J. stated the duty depends in part on the historically wide discretionary control of the Crown in regard to aboriginal peoples, and on a corresponding vulnerability in the people affected.[95]

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91. *Ibid.* at para. 76.

92. *Ibid.*, quoting from *Guerin, supra* note 2 at 378-79 [emphasis added].

93. *Wewaykum*, *ibid.* at para. 77. This was the interest that *Guerin* described as "the same" as an aboriginal title interest for the purpose of identifying a fiduciary duty. Binnie J. noted that the words "the same" referred specifically to an Indian reserve interest.

94. Binnie J. stressed the reference in *Sparrow, supra* note 2 at para. 59, to the "historic powers and responsibility assumed by the Crown" in relation to Indian rights.

95. *Ibid.* at para. 80. See *Perron, supra* note 42, rejecting an alleged Crown fiduciary duty in regard to the definition of aboriginal status. Referring to the stress on discretionary control in *Wewaykum*, the Court said that the Crown had no such control here, because Indian status is defined by Parliament.

These circumstances were part of a situation in which the Crown "undertook" obligations regarding aboriginal peoples.[96] Binnie J. did not elaborate on the form of the commitment, which could presumably be implicit as well as express. The commitment could presumably be created either "by statute, agreement or perhaps by unilateral undertaking," as suggested in *Guerin*.[97] Thus, an undertaking, discretionary control and vulnerability were found to be three more elements of the Crown-aboriginal fiduciary duty.

E. A Specific and Significant aboriginal Interest

After saying that the special fiduciary duty does not extend to all aspects of the Crown-aboriginal relationship, Binnie J. quoted from a decision that rejected the duty partly because neither Indian lands nor section 35(1) rights were involved.[98] He continued:

> In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. Land was also the subject matter of *Ross River* ("the lands occupied by the Band"), *Blueberry River* and *Guerin* (disposition of existing reserves). Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*.[99]

Thus, specificity and significance were needed for yet another requirement of the duty, a "cognizable Indian interest":[100]

> I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto

96. *Sparrow*, *ibid.* at para. 74.
97. *Guerin*, *supra* note 2 at 384. Neither in *Guerin* nor in *Wewaykum* is there any requirement that this undertaking be explicit.
98. *Wewaykum*, *supra* note 4 at para. 84, quoting from *Chippewas of the Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)* (1999), 251 N.R. 220 at para. 6 (F.C.A.). Binnie J. appeared to support the quoted passage.
99. *Wewaykum*, *ibid.* at para. 81.
100. *Ibid.* at para. 85.

in a way that invokes responsibility "in the nature of a private law duty," as discussed below.[101]

F. Some Limits: The Scope of the Duty

We can now summarize the main threshold elements that Binnie J. appeared to consider necessary for the imposition of a Crown-aboriginal fiduciary duty. This duty can apply where the following elements are present: an undertaking, sufficient discretionary power in the Crown, a corresponding vulnerability in the aboriginal peoples affected, and an aboriginal interest that is both cognizable and independent. To be cognizable, the interest should be sufficiently specific and central to aboriginal economies and culture. To be independent, the interest should be sufficiently autonomous of the Crown to give rise to an obligation "in the nature of a private law duty."[102] Again and again, Binnie J. suggested that the archetype of an independent interest—that is, an interest that relates to pre-existing aboriginal title—is Indian land.[103]

G. Abandoning Guerin*?*

Did the situation in *Wewaykum* qualify for a Crown-aboriginal fiduciary duty? By several criteria, it seemed less appropriate for such a duty than the situation in *Guerin*. First, while *Guerin* involved the disposition of existing reserve land, the *Wewaykum* parcels were not formal *Indian Act* reserves before 1938.[104] Second, while the reserve in *Guerin* had originally been part of the Musqueam's aboriginal title lands, there was no indication that the *Wewaykum* parcels were originally traditional lands of the Laich-kwil-tach First Nation.[105] Third, while in *Guerin* the Crown played an intermediary role between Indians

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101. *Ibid.*

102. See *supra* notes 72, 87, 99.

103. See *e.g. Wewaykum*, *supra* note 4 at para. 74: "A quasi-proprietary interest (*e.g.*, reserve land) could not be put on the same footing as a government benefits program." See also *Guerin*, *supra* note 2 at para. 81.

104. *Wewaykum*, *ibid.* at para. 91.

105. *Ibid.*

and non-Indians in regard to an existing Indian interest in lands, no private third party was directly concerned in *Wewaykum*.[106] What was involved generally in *Wewaykum* was "the creation of an altogether new interest in lands to which the Indians made no prior claim by way of treaty or aboriginal right."[107]

Yet Binnie J. said these differences were *not* necessarily fatal to the scope of the duty:

> This is not to suggest that a fiduciary duty has no role to play in these circumstances. It is to say, however, that caution must be exercised. As stated, even in the traditional trust context not all obligations existing between the parties to a well-recognized fiduciary relationship are themselves fiduciary in nature. . . .[108]

Binnie J. concluded that the Crown did owe a fiduciary duty in *Wewaykum*, even before the formal establishment of the reserves in 1938. There was a specific interest (the interest in the Indian land) that was important to the claimants. The Crown had assumed discretionary control in relation to that interest, which resulted in a corresponding Indian vulnerability (occupation of the land by . . . and dependence on the discretion of the Crown to create reserves).[109] Binnie J. made no specific finding that the interest was independent of the Crown.

Was the Court suggesting here that if those who sue the Crown have no independent interest, the political trust presumption simply disappears, to be replaced by the fiduciary principles applicable to non-aboriginal claimants?[110] Such an interpretation seems unlikely. It would be at odds with *Guerin*, where the existence of an independently-based

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106. *Ibid.*

107. *Ibid.*

108. *Ibid.* at para. 92.

109. Binnie J. noted that the Court had said in its earlier *Ross River* decision, *supra* note 62, at paras. 88-89 that reserve creation attracts the Crown-aboriginal fiduciary duty, and that consideration should be given to long occupation of lands. Here, the Bands had occupied provisional reserves for a long time, and had depended on the Crown to complete the reserve-creation process. Hence there was a fiduciary duty both before and after the formal creation of the reserves in 1938. Binnie J. went on to suggest that the Bands' pre-1938 interests in the lands attracted a more basic level of fiduciary protection, while the interest in the formal reserves attracted a higher standard: see Part V I., below.

110. See *Wewaykum, supra* note 4 at para 92.

obligation "in the nature of a private law duty"[111] was crucial to imposing liability on the Crown. It would also be inconsistent with the statements in *Wewaykum* which suggest that independence is a key threshold element of a Crown-aboriginal fiduciary duty.[112] It would give no content to Binnie J.'s. call for caution in identifying fiduciary obligations.[113] For lower courts seeking guidance on non-independent aboriginal claims and non-aboriginal fiduciary claims against the Crown, the Supreme Court would seem to be saying, "just use your discretion." Instead of doing something about the "flood" of Crown fiduciary duty claims, this interpretation would throw away many of the sandbags.

An alternative interpretation is that, although an independent property interest is required, it does not need to be a pre-existing interest. Under this interpretation, the Wewaikai and the Wewaykum had no pre-existing property interest in this case, but they *gained* an independent interest in the lands. They gained it from the Crown's informal pre-reserve allocation of the lands, from their own occupancy of the lands, and from the Crown's establishment of the lands as formal reserves. This interpretation would be consistent with Binnie J.'s reference to the Indian interest as "altogether new."[114] It would be consistent with the Ontario Court of Appeal's approach in *Authorson*, in which an independent interest can be either pre-existing or acquired.[115]

On the other hand, to be consistent with *Wewaykum*'s stress on the need for limits, this approach would need refinements,[116] and none were offered here. Moreover, although this approach could affect fiduciary claims beyond the Crown-aboriginal fiduciary duty, Binnie J. made no reference to the *Callie-Authorson* debate. In fact, neither this

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111. See *supra* notes 89, 99, 101-02.

112. See *Wewaykum, supra* note 4 at para 76.

113. *Ibid.* at para. 92.

114. *Ibid.* at para. 95.

115. See Part IV D., above; see also *supra* note 70.

116. If acquired property interests can overcome the political trust presumption as readily as pre-existing interests, the result would be a significant expansion in the range of aboriginal and non-aboriginal fiduciary claims possible against the Crown: see Part V H., below.

interpretation nor the even wider interpretation discussed above was needed in the context of *Wewaykum* itself.

H. Degrees of Independence

There is a third possible interpretation of the Court's treatment of the interests in *Wewaykum*. Under this interpretation, the Court is *not* discarding the independence that was required in *Guerin*, but is treating it the same way as it treats all the other threshold elements of the Crown-aboriginal fiduciary duty—that is, as a matter of degree.

In *Guerin* itself, the element of independence was relatively strong. The Musqueams' statutory reserve interest had been created to protect their original interest in traditional Musqueam lands in the same area. The reserve interest was thus closely tied to interest with the highest possible independence of the Crown—the original aboriginal title. Because of this, the political trust doctrine could be overcome with relative ease. However, virtually *all* Crown actions that set aside land for aboriginal peoples are part of the Crown's general policy of protecting their original aboriginal title, whether by preservation or replacement.

Seen in this light, the interest in *Wewaykum* also falls within the independence spectrum, although at the weaker end at first. The claimants' interest in the informal allocations was "altogether new," at least initially, because it had not been made within traditional Wewaykum or Wewaikai lands. In this respect, the initial interest was less independent than the formal reserve interest that followed. But the informal allocations and the later creation of formal reserves both flowed from the Crown's general policy of protecting aboriginal land and property interests, in recognition of aboriginal peoples' original use and occupation. Reserves 11 and 12 were replacements for the pre-existing Indian interest, rather than confirmations of it. This affected the strength, but not the existence, of their independence.

Because of the relative weakness of the element of independence, the Court looked for strength in the other factors. The Bands were claiming Indian land, which was a specific and identifiable interest that was central to the aboriginal economies and cultures. The parcels were

important for both settlement and fishing.[117] The Crown had assumed a responsibility for the reserve-creation process, and the Bands were totally dependent on that discretion.[118] As a result, a basic Crown fiduciary duty existed even before 1938, when the reserves were formally established. When this happened, the interest expanded to approximate the reserve interest in *Guerin*.[119]

This broad but flexible approach to the concept of pre-existing independence is quite consistent with *Guerin*. That case did not limit the Crown-aboriginal fiduciary duty to formally established *Indian Act* reserves, nor did it require a specific link between the protected reserve interest and the aboriginal title in the same area. Rather, it found that for fiduciary purposes the interest in an Indian reserve is "the same" as the traditional aboriginal title interest.[120] *Guerin*'s focus, arguably, was on all situations where government has ensured that "Indians have a legal right to occupy and possess certain lands," in recognition of their original occupation and use.[121] The distinguishing feature in *Guerin*, then, was land.

Under this interpretation, the Indian interests in *Wewaykum* qualified for potential fiduciary protection *because* of the distinguishing feature in *Guerin*, not despite it. This approach is consistent with the Court's earlier requirement of an obligation "in the nature of a private law duty."[122] Although this obligation was not expressly identified,[123] it seems to be implied in the Court's repeated stress on the important role of Indian land.[124] As well, this general approach reinforces the Court's

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117. *Wewaykum, supra* note 4 at paras. 12, 31 and 36. Reserve 11 was especially important for fishing.

118. *Ibid.* at para. 89.

119. *Ibid.* at paras. 98-100.

120. *Guerin, supra* note 2 at 379.

121. *Guerin, supra* note 2 at 382.

122. *Wewaykum, supra* note 4 at paras. 74, 76 (as quoted from *Guerin, supra* note 2 at 322, 385), 85. As seen at note 37, above, aboriginal title is a right to occupation and use of land.

123. Note that immediately before Binnie J. assessed whether the elements in the *Wewaykum* situation gave rise to a Crown fiduciary duty, he required that such an obligation "invokes responsibility 'in the nature of a private law duty,' *as discussed below.*" [emphasis added].

124. *Wewaykum, supra* note 4 at paras. 76, 78, 81, 84, 88.

stress in *Wewaykum* that "there are limits."[125] It requires at least a general connection to the original independent aboriginal interest, while recognizing that the degree of connection may vary from case to case.

This interpretation does not stop the Court from deciding, if it wishes, to recognize acquired independence,[126] along the lines envisaged by the Ontario Court of Appeal in *Authorson.*[127] Certainly, the Court did not close the doors to this possibility in *Wewaykum*. However, if the doors are opened, care is needed not to sacrifice the integrity of the independence limit. An interest with acquired independence is a creation of government. As such, it is generally *less* independent of the Crown than is a pre-existing aboriginal interest. Therefore, to overcome the political trust presumption, an acquired independence interest should normally need more support from other fiduciary elements, such as the explicitness of the undertaking or the extent of the vulnerability.[128]

Crown fiduciary liability of this kind[129] should be an exceptional phenomenon.[130] A less stringent approach than this could undermine

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125. *Ibid.* at para. 81.

126. I.e., independence that results from a Crown interest having passed into private hands, as opposed to independence that results from a basis in an interest—such as aboriginal title—that preceded that of the Crown itself. See the discussion of the Ontario Court of Appeal's decision in *Authorson, supra* note 23 in Part IV D., above.

127. See *supra* notes 72, 74 and the discussion following them. This is certainly a possibility, in light of the Supreme Court's decision in *Authorson, ibid.*, delivered a half-year after *Wewaykum, supra* note 4.

128. If the Court moves in the *Authorson* direction, it would presumably hold that an interest becomes "private" when the beneficiary acquires a full beneficial interest. Because it originates in the Crown, and becomes private only by virtue of Crown discretion, such an interest lies lower on an extended independence spectrum than do pre-existing interests. Hence a Crown fiduciary duty might be possible in regard to such an interest, but this should be so only if the other elements of the situation point very strongly toward it. Other equitable considerations, such as the availability of other remedies, should also be relevant here.

129. Similar constraints should apply to legally enforceable non-proprietary fiduciary duty claims against the Crown, outside the Crown-aboriginal fiduciary duty. The same general considerations that underpin the political trust presumption in a trust-like context—unique public responsibility and political accountability—also support a presumption against general Crown liability in non-proprietary contexts.

the rationales behind the political trust presumption, erode the boundaries of the Crown-aboriginal fiduciary duty, and deepen the flood of Crown fiduciary claims. However, in *Wewaykum*, the Court did not suggest that it was addressing anything but the special Crown fiduciary duty to aboriginal peoples. The acquired independence issue was left for another day.

I. More Limits: The Content and Outcome of the Duty

Binnie J. stressed that there are limits to the content as well as the scope of the Crown-aboriginal fiduciary duty. Specifically, he stated that "[t]he content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity."[131]

Using this varying standard approach, Binnie J. said that before the parcels were established as formal *Indian Act* reserves in 1938, the Bands' interests would have been subject to a lower level of protection than the interests in the formal reserves. Before 1938, the Crown's obligation involved ". . . the basic requirements of the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with a view to the best interest of the aboriginal beneficiaries."[132]

Binnie J. said that the pre-reserve interests should be considered in conjunction with the Crown's public responsibilities. In light of the *Blueberry River* and *Osoyoos* decisions, the same is presumably true for existing reserve interests.[133] *All* interests, both public and aboriginal, are presumably subject to the need for accommodation that underlies both

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130. It has been argued that where fiduciary elements are not strong enough to impose directly enforceable fiduciary duties on government, they may still be sufficient to subject discretionary powers to an enhanced standard of administrative law reasonableness: Sossin, *supra* note 19. This approach is not necessarily incompatible with a stringent approach to directly enforceable government fiduciary duties. It might be asked, though, if factors such as vulnerability and reliance could be accommodated within existing administrative law fairness and reasonableness concepts.

131. *Wewaykum, supra* note 4 at paras. 86-87.

132. *Ibid.* at para. 93.

133. See Part IV B., above.

section 35(1) and fiduciary law.[134] In contrast, for the formal reserve interests, the Crown's fiduciary duty should also include the "protection and preservation of the Band's interest from exploitation."[135]

Applying these two different levels of fiduciary standard, Binnie J. concluded that the Crown had not breached its fiduciary duties to either Band. The trial judge had found that before the formal creation of reserves, the Crown had sought out the views of the Bands, had disclosed all relevant information and had been even-handed in its dealings with the Bands. Binnie J. found no reason to disagree with those findings.[136] After the formal creation of the reserves, there was no evidence that the Crown had failed to provide protection against exploitative bargains. Even if this higher standard could have applied before the reserves were formally created, it had been met. At the time of the 1907 resolution, for example, the Wewaikai were apparently fully informed and autonomous, and they were involved in a dispute with another Band, not with a non-Indian private third party.[137]

Binnie J. noted that the outcome of the Crown-aboriginal duty can be affected by the conduct of the claimants. Here, by clearly recognizing the other's occupation of the relevant lands in the past, the Bands had acquiesced in it, and had barred themselves from claiming a breach of duty in regard to the land.[138] Binnie J. also agreed with the government's argument that because the Band had not pursued their claims earlier, the claims were barred by the relevant limitations statutes.[139] He said that since the claims to possession were based on events before 1888,[140] in 1938,[141] or perhaps 1937,[142] the relevant limitation periods had passed.

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134. *Wewaykum, supra* note 4 at para. 96 where Binnie J. seems to intend this, but the emphasis is on the pre-reserve stage. Perhaps a higher level of accommodation is required at this stage?

135. *Ibid.* at para. 97.

136. *Ibid.*

137. *Ibid.* at para. 102.

138. *Ibid.* at para. 111.

139. *Ibid.* at paras. 131-32, 135-36.

140. When the Wewaykum first started settling on Reserve 11, contrary to the Wewaykum's claim of possession to that parcel of land.

141. When the Wewaykum's name was linked by dittos to Reserve 12 in the 1938 order in council, providing the formal basis of their claim to that parcel of land.

Binnie J. rejected the contention that the Bands' alleged entitlement to their lands resulted in ongoing equitable wrongs, including continuous Crown fiduciary duty breaches, that were not caught by the limitations period. "[A]cceptance of such a position," he stated "would, of course, defeat the legislative purpose of limitation periods."[143]

VI. Lifting the Cloud

How could the Court strengthen its attempt to clarify the Crown-aboriginal duty in *Wewaykum*?

The first step would be to adopt an interpretation of *Wewaykum* that keeps the distinguishing feature that was so critical to *Guerin*—derivation from an interest independent of the Crown.[144] This notion need not be applied rigidly, but it gives shape to the duty in non-section 35(1) contexts. It provides a coherent way of recognizing aboriginal uniqueness, without aBandoning the presumption in favour of the Crown's more general public responsibilities.

The second step would be to recognize what already seems implicit in the case law[145]—that although the *Guerin* and *Sparrow* duties share the same basic analogies to ordinary fiduciary law, and although they can overlap at times, they remain two very distinct applications of the Crown-aboriginal fiduciary relationship. By keeping these duties distinct, courts support the regulatory emphasis on the constitutional duty[146] and protect the independence feature of the *Guerin* duty.

Third, after *Wewaykum*, the Supreme Court of Canada is now well placed to consolidate the key conceptual elements in the non section 35(1) or *Guerin*-type duty. Most of these elements are already present in *Wewaykum* and earlier case law. By making these elements more explicit

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142. *Wewaykum, supra* note 4 at para. 130. This was the date following the second of the two Band declarations recognizing each other's possession. Binnie J. noted that the trial judge had found that at least by the time of the discussions before these declarations, both Bands had been made aware of all of the relevant information.

143. *Ibid.* at para. 135.

144. See *Guerin, supra* note 2 at 351-2, 378-9.

145. See Part III D., above.

146. For this emphasis, see *supra* notes 43-44 and accompanying text.

and by linking them systematically, the Court should be able to articulate a general analytical approach to this duty. By doing that, the Court would complement what it is already starting for the *Sparrow* duty.[147] Although this effort will not guarantee predictable results, it should reduce both uncertainty and litigation. A possible approach to the non-section 35(1) duty might look something like this:

A. Scope

1. The scope of the fiduciary duty would depend on several main threshold elements, including: (i) an undertaking; (ii) Crown discretionary control; (iii) vulnerability; (iv) an aboriginal interest that was specific and central to aboriginal economies or culture; and (v) an aboriginal interest that was independent of the Crown by virtue of its general basis in pre-existing aboriginal title.[148]
2. All traditional aboriginal property interests, all aboriginal land reserved under any conditions by the Crown and all aboriginal interests derived from this land should be deemed to have a general basis in pre-existing aboriginal title.[149]
3. The independence of the aboriginal interest required to support a Crown-aboriginal fiduciary duty, like the other threshold

147. *Ibid.* and the discussion following those notes. Arguably, in light of decisions such as *Delgamuukw*, *supra* note 35, courts are to consider a variety of accommodating measures for justification. Among these are:
-The relative weight of the valid legislative goals.
-The relevance of the infringement to these goals.
-The extent and nature of the infringement.
-The extent to which government attempted to minimize potential harm caused by the infringement.
-The certainty of the claimed aboriginal right (the extent to which it could be said to have *prima facie* legal validity, or is agreed to by the parties, or has been proven in the courts).
-The extent of the claimed aboriginal right and the nature of its relationship to land, with greatest protection for aboriginal rights.

148. See Part V F., above.

149. As argued in Part V H., above, this is the approach that seems most consistent with *Wewaykum* and the earlier case law.

elements, could be a matter of degree.[150] Where the connection with pre-existing aboriginal title was more indirect, stronger evidence of the other elements would be needed before a duty was imposed.[151]

4. The fiduciary duty would be capable of being excluded by the conduct of the claimant, as under the doctrine of laches and acquiescence, and by relevant statutory limitation periods. However, the latter should not begin to run until the claimant had access to the information necessary to pursue the claim.

B. Content

1. The content of the fiduciary duty should vary with the circumstances of the individual case, including the following factors:
   a) The nature and importance of the aboriginal interest, including the degree to which it was linked to its roots in traditional aboriginal rights or title.[152]
   b) The nature and extent of the Crown's discretionary power, including the extent of any implied or express undertakings.[153]
   c) The position of the aboriginal claimant, including the claimant's relative autonomy, vulnerability, and conduct.
   d) The nature and importance of any conflicting interests.[154]
2. Generally speaking, the factors that point to a higher standard of duty would include an important interest on the part of the claimant, a greater discretionary power with the Crown, special vulnerability on the part of the aboriginal claimant, and conflicting interests that were less important or immediate.[155] Lower level standards would include general good faith and

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150. See Part V H., above.

151. See text before note 134 above.

152. See *Wewaykum, supra* note 4 at para. 93.

153. *Ibid.* at para. 85. If an express undertaking can help create a special fiduciary duty, it can help shape its content as well.

154. See *ibid.* at paras. 97, 102 and text accompanying notes 136-37.

155. This approach builds on the varying content approach prescribed in *Wewaykum, ibid.* at paras. 86-87.

loyalty and, where relevant, full disclosure of relevant subject matter and even-handedness among beneficiaries. Higher level protections, typically for situations in which a claimant had a formal beneficial interest would include positive measures to secure the interest against exploitation.

3. Where a Crown public duty conflicted with a Crown fiduciary duty to aboriginal peoples, the Crown should attempt to perform the public duty with minimum disruption to the aboriginal interest.[156] The extent of accommodation to be attempted should depend on factors such as the nature and importance of the affected aboriginal interest.

C. Consequences

1. In assessing the extent to which the Crown had complied with the special fiduciary duty, courts should consider its conduct in regard to the protected interest, the presence of conflicting interests and mitigating actions, and the availability of less intrusive means of carrying out the Crown's objectives.
2. Where a duty was owed, a court could, where appropriate, apply it to the construction of a relevant document instead of providing specific equitable relief, such as monetary compensation, in the event of a breach.

D. Context

1. Where the *Guerin*-type Crown-aboriginal fiduciary duty was not available, relief *might* be available under the section 35(1) duty described earlier or under general fiduciary law.[157]
2. Under general fiduciary law, fiduciary duties should not be enforceable against the Crown except in special circumstances,

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156. See *ibid.* at para. 96.

157. See notes 41-46 above, indicating that the section 35(1) duty is concerned with constitutionally guaranteed rights and is subject to justified infringements; and see Part IV D., and notes 127-132 above, on the possibility of a general Crown fiduciary duty outside the *Guerin* or *Sparrow* contexts.

such as where there was clear evidence of an undertaking or where there was a combination of factors such as exceptional discretion and vulnerability, and an absence of other effective means of redress.

VII. Indelible Ink

What happened to those ditto marks? The Department of Indian Affairs finally removed them from its Schedule in 1943, nearly four decades after the clerical slip. However, the marks still appeared in the official schedule to the provincial order in council that transferred the land to federal jurisdiction in 1938.

In *Wewaykum*, the Supreme Court of Canada said it could do nothing about the order in council. Judicial rectification must fulfill the intent of the enacting body.[158] Since the province had no jurisdiction over reserve allocation, it could have no valid intent on this matter.[159] Hence, even after the Supreme Court's decision in 2001—after seven superior court decisions that totalled more than a thousand paragraphs[160]—the marks remained intact, enshrined in an order in council, and edging toward their centenary. On the other hand, if the marks had caused serious equitable damage, the fiduciary duty might have had some effect.

VIII. Conclusion

The Crown-aboriginal fiduciary duty is a promising but uneven bridge between aboriginal uniqueness and legal help against the Crown. Since *Guerin* and *Sparrow*, the concept's flexibility has outrun its clarity. In its non-section 35(1) form, the duty has offered a pliant tool for correcting errors. But it has also blurred boundaries, encouraged litigation and generated uncertainty. This duty needs clearer contours. It also needs more coherence, not just for conceptual tidiness but to help courts maintain a reasonable balance between fairness and the general duties of

158. *Wewaykum, supra* note 4 at para. 69.
159. *Ibid.* at para. 70.
160. *Ibid.*

the state. The Supreme Court of Canada said in *Wewaykum* that "there are limits," but it was only tentative about sketching them in. The analytical approach suggested here will not lift all the cloud, but it could make a start. Legal uncertainty can be as persistent as the ditto error in *Wewaykum*, but it too can be controlled.